Filed 7/27/10 P. v. Savage CA1/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>MICHAEL ANDREW SAVAGE,<br>Defendant and Appellant. | A127104<br><br>(Solano County<br>Super. Ct. No. FCR266952) |

Defendant Michael Savage appeals from a judgment and sentence following a no contest plea to one count of using a minor for a sex act (Pen. Code, § 311.4, subd. (c)).[1] His attorney has filed a *Wende* brief raising no issues and asks this court to conduct an independent review of the record to identify any issues that could result in reversal or modification of the judgment if resolved in defendant's favor. (*People v. Wende* (1979) 25 Cal.3d 436; see *People v. Kelly* (2006) 40 Cal.4th 106; *Smith v. Robbins* (2000) 528 U.S. 259.) Counsel declares he notified defendant he could file a supplemental brief raising any issue he wishes to call to this court's attention. Defendant filed no supplemental brief.

Upon independent review of the record, we conclude no arguable issues are presented for review and affirm.

## BACKGROUND

On June 1, 2009, the Solano County District Attorney filed a criminal complaint against defendant alleging six counts—two counts of sexual penetration by foreign object

[1] All further statutory references are to the Penal Code unless otherwise indicated.

of a person under age 18 years (§ 289, subd. (h)), two counts of oral copulation of a person under age of 18 years (§ 288a, subd. (b)(1)), one count of using a minor for sex acts (§ 311.4, subd. (c)), and one count of child molestation (§ 647.6, subd. (a)). It was further alleged defendant committed acts which aggravated the crimes pursuant to California Rules of Court, rules 4.408 and 4.421.

A preliminary hearing was held on July 6, 2009. Defendant had offered to waive a preliminary hearing, but the district attorney chose to proceed, agreeing not to add additional charges. The first witness was D.W., who at the time of the hearing was 17 years old and described defendant as the father of her ex-boyfriend. D.W. first met defendant when she was 16. She told defendant how old she was, and went with defendant and his son to a hotel, where they took nude photographs. Several weeks later she went with defendant to a day spa, where he repeatedly asked if she would have oral sex with him. She became scared, and defendant ceased making the request. About a week later, D.W. again went with defendant and his son to a hotel. Defendant asked if he could place his finger on her vagina. She agreed because she was scared. He stroked her clitoris and penetrated her digitally. He also had oral sex with her. Defendant had brought a camera, and several photographs were taken of D.W. and defendant.

The second witness was Sergeant Charlie Jackson Spruill, who arrested defendant. Defendant was read his *Miranda*[2] rights before he was interviewed. The interview was recorded, and during the interview defendant admitted taking photographs of D.W. had been his idea and he believed she was then 16 years old. Defendant did not call any witnesses.

The court held defendant to answer on the charges.

On July 7, 2009, the district attorney filed a six-count information: two counts of sexual penetration by foreign object, under age 18 years (§ 289, subd. (h)), two counts of oral copulation of a person under age of 18 years (§ 288a, subd. (b)(1)), one count of

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

using a minor for sex acts (§ 311.4, subd. (c)), and one count of child molestation (§ 647.6, subd. (a)).

On September 25, 2009, defendant completed and signed a change of plea form, pleading no contest to one count of using a minor for sex acts (§ 311.4, subd. (c)). On the plea form, defendant acknowledged he would be subject to section 290 registration. He also initialed the box that he was giving up his right to appeal. His attorney completed the attorney's statement, declaring she had fully advised defendant with respect to the change of plea. The trial court found defendant had knowingly and voluntarily waived his rights and accepted his change of plea. Defendant waived time for sentencing, and on November 20, 2009, was sentenced to the midterm of two years in state prison and ordered to register under section 290 and not to reside within 2,000 feet of any school or park.

On December 17, 2009, acting in propria persona, defendant filed a notice of appeal and application for a certificate of probable cause. Defendant asserted the following litany of reasons for requesting a probable cause certificate: His Fourth Amendment rights had been violated by an unlawful search and seizure of his belongings at a National Guard Armory. He was arrested without being told why he was being arrested. His Fifth Amendment rights had been violated by "coercive and controlling lawyers." His lawyers rendered ineffective assistance of counsel by not explaining his rights, "allowing the supposed victim to perjure herself on the witness stand," not investigating his claim of innocence, coercing him to change his plea and not helping him with a power of attorney for his son while he was incarcerated. His Eighth Amendment rights had been violated because the trial court had imposed excessive bail and imposed fees he cannot pay. He claimed he had "not committed a crime" and wished "to withdraw his plea." The trial court granted defendant's application on December 21, 2009.

## DISCUSSION

Ordinarily, by pleading no contest to a criminal offense, a defendant admits the legal sufficiency of the evidence establishing the crime and is not entitled to review of

any issue that addresses the question of guilt, with the exception of the denial of a motion to suppress. (*People v. Hunter* (2002) 100 Cal.App.4th 37, 41-42; Cal. Rules of Court, rule 8.304(b)(4).) This prohibition does not apply, however, as to issues for which a defendant has obtained a certificate of probable cause *unless* the defendant has knowingly and expressly waived his right to appeal. In such case, the express waiver controls, and a certificate of probable cause will not salvage issues on appeal. (See *People v. Buttram* (2003) 30 Cal.4th 773, 793-794 (conc. opn. of Baxter, J.); *People v. Panizzon* (1996) 13 Cal.4th 68, 80.) Here, defendant expressly waived his right to appeal, and the record reflects that his waiver was knowing and voluntary. Therefore, his procurement of a probable cause certificate does not allow him to raise on appeal the litany of issues identified in his probable cause application. Furthermore, defendant made no record as to these issues in the trial court. For example, he did not make a motion to suppress. Accordingly, there is no record before us that permits appellate review of such issues.

As for the record that does exist and is before us, upon independent review, we find no meritorious issues that require further briefing on appeal. He appears to have been competently represented by appointed counsel. His written change of plea form was completed and signed by both defendant and his counsel. At the change of plea hearing, the trial court expressly asked defendant if he understood and was giving up his rights, and defendant responded in the affirmative. Defendant was duly sentenced to the midterm of two years, consistent with the terms of his negotiated plea disposition. The district attorney asked that the remaining counts be dismissed pursuant to a *Harvey* waiver, and the trial court immediately did so.[3] While defendant was present at the hearing, he did not in the plea form or expressly on the record make such a waiver. Thus, it appears there was no *Harvey* waiver. As discussed above, however, defendant waived his right to appeal. In addition, this issue would not be ripe, in any event since the trial court expressly reserved the issue of restitution to the Victims' Compensation Board and there is no indication defendant has been ordered to pay any restitution.

[3] *People v. Harvey* (1979) 25 Cal.3d 754, 758 (*Harvey*).

## DISPOSITION

The judgment is affirmed.

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Banke, J.

We concur:

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Marchiano, P. J.

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Margulies, J.